

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL E. HENRY, et al.,

Plaintiffs,

v.

DAVID CRAIG CONKLIN and SUSAN
CONKLIN, et al.,

Defendants.

NO: CV-12-5038-RMP

ORDER GRANTING THE
FEDERAL DEPOSIT INSURANCE
CORPORATION'S MOTION TO
DISMISS

Before the Court is a motion to dismiss by Defendant Federal Deposit Insurance Corporation ("FDIC"), ECF No. 14. Oral argument was held on this matter. The Court has reviewed the motion, the memoranda filed in support and opposition, the parties' declarations, all other relevant filings, and is fully informed.

BACKGROUND

According to the complaint, ECF No. 1, Plaintiff SMI Group XV, LLC ("SMI") is a Washington limited liability company. SMI sought a loan from Bank

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1 of Whitman. Plaintiff Michael Henry, apparently acting as an agent for SMI, met
2 with Defendants and Bank of Whitman employees, Craig Conklin and James
3 Tribbett, for the purpose of closing the loan. During the close of the loan, Mr.
4 Henry executed a commercial guaranty that rendered him personally liable for
5 repayment of the loan. Mr. Henry also executed a memorandum of understanding
6 (“MOU”) in which Bank of Whitman agreed to limit or eliminate Mr. Henry’s
7 personal liability to repay the loan on condition that SMI acquire through
8 foreclosure one or two specific parcels of real property and pledge those parcels as
9 collateral against the loan.

10 SMI was able to acquire one of the two parcels of real property, but before it
11 could pledge that parcel as collateral on the loan, the FDIC was named as receiver
12 for Bank of Whitman. SMI communicated to the FDIC that it wished to pledge its
13 real estate as collateral and to reduce Mr. Henry’s personal liability on the loan
14 pursuant to the MOU. However, the FDIC declined Mr. Henry’s invitation and
15 challenged the enforceability of the MOU. The FDIC asserted that there was no
16 record that Bank of Whitman’s board of directors had approved the MOU and
17 asserted that the MOU was not found in the official records of the Bank of
18 Whitman.

19 The Plaintiffs filed the instant action seeking a declaration that either the
20 commercial guaranty is void or that the MOU is enforceable against the FDIC as

1 receiver of the Bank of Whitman. Additionally, Plaintiffs sued Defendants
2 Conklin and Tribbett for negligence for allegedly failing to continuously maintain
3 the MOU in the records of the Bank of Whitman and for failing to record the board
4 of directors' approval of the MOU in the official minutes or, alternatively, failing
5 to procure such approval.

6 After Plaintiffs filed this action, the FDIC filed an action, CV-12-5056-
7 RMP, against Mr. Henry and SMI involving many of the same issues that are
8 presented by this action. The FDIC also filed this motion arguing that this Court
9 lacks subject matter jurisdiction to hear Plaintiffs' claims for declaratory relief.
10 Alternatively, the FDIC argues that this Court should decline to exercise its
11 declaratory jurisdiction and dismiss Plaintiffs' claims against the FDIC in favor of
12 case number CV-12-5056-RMP.

13 **APPLICABLE LAW**

14 A motion to dismiss under Fed.R.Civ.P. 12(b)(1) addresses the court's
15 subject matter jurisdiction. Federal courts have limited jurisdiction. *Kokkonen v.*
16 *Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). "A federal court is presumed to
17 lack jurisdiction in a particular case unless the contrary affirmatively appears."
18 *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir.1989).
19 Limits on federal jurisdiction must be enforced. *Owen Equipment & Erection Co.*
20 *v. Kroger*, 437 U.S. 365, 374 (1978). A plaintiff bears the burden to establish that

1 subject matter jurisdiction is proper. *Kokkonen*, 511 U.S. at 377; *Prescott v.*
2 *United States*, 973 F.2d 696, 701 (9th Cir.1992).

3 DISCUSSION

4 The FDIC's first argument is that this Court lacks jurisdiction under 12
5 U.S.C. § 1821(d)(13)(D) because Plaintiffs failed to exhaust their administrative
6 remedies. Under the Financial Institutions Reform, Recovery, and Enforcement
7 Act of 1989 ("FIRREA"), the FDIC may be appointed receiver of state depository
8 institutions. 12 U.S.C. § 1821(c). As receiver, the FDIC is empowered to resolve
9 claims made against the depository institution in receivership. § 1821(d)(3).
10 FIRREA establishes a process for the handling of claims by the FDIC. *See*
11 § 1821(d)(5)-(8). FIRREA places limits on the ability of claims to be brought
12 outside of the claims process. Specifically, § 1821(d)(13)(D) reads:

13 Limitation on judicial review. Except as otherwise provided in this
14 subsection, no court shall have jurisdiction over—

15 (i) any claim or action for payment from, or any action seeking
16 a determination of rights with respect to, the assets of any
17 depository institution for which the Corporation has been
18 appointed receiver, including assets which the Corporation may
19 acquire from itself as such receiver; or

20 (ii) any claim relating to any act or omission of such institution
or the Corporation as receiver.

1 “The phrase ‘except as otherwise provided in this subsection’ refers to a provision
2 that allows jurisdiction after the administrative claims process has been
3 completed.” *McCarthy v. FDIC*, 348 F.3d 1075, 1078 (9th Cir. 2003).

4 The FDIC argues that this Court lacks jurisdiction over Plaintiffs’ claims
5 because Mr. Henry failed to first pursue his claims through FIRREA’s
6 administrative claims process. The Plaintiffs do not contest that Mr. Henry failed
7 to file an administrative claim. The Plaintiffs assert, however, that their
8 declaratory judgment action may proceed against the FDIC because Plaintiffs’
9 claims fall outside the scope of FIRREA’s exhaustion requirement. Specifically,
10 Plaintiffs assert that exhaustion is not required because Plaintiffs make no claim
11 against the assets of the Bank of Whitman and because Plaintiffs seek only
12 equitable relief based on the FDIC’s breach of contract.

13 The Plaintiffs’ argument involves the complicated interplay between three
14 Ninth Circuit cases interpreting the exhaustion requirement of § 1821(d)(13)(D).
15 In *In re Parker N. Am. Corp.*, 24 F.3d 1145 (9th Cir. 1994), Parker North
16 American Corporation (“PNA”) borrowed \$10 million from Sooner Federal
17 Savings and Loan Association (“Sooner”). *Id.* at 1148. After repaying \$4.65
18 million to Sooner, PNA filed for Chapter 11 bankruptcy. *Id.* PNA then filed an
19 adversary action against Sooner seeking to recover the \$4.65 million as a
20 preferential transfer. *Id.* Sooner filed proofs of claim before the bankruptcy court

1 seeking payment on the \$10 million loan. Shortly thereafter, the Office of Thrift
2 Supervision declared Sooner insolvent and appointed the Resolution Trust
3 Corporation (“RTC”) as receiver of Sooner pursuant to FIRREA. *Id.*

4 The RTC moved for summary judgment in PNA’s preference action before
5 the bankruptcy court. *Id.* at 1149-50. The bankruptcy court granted the summary
6 judgment motion on the basis that the bankruptcy court lacked jurisdiction because
7 PNA had failed to exhaust its administrative remedies under FIRREA. *Id.* at 1150.
8 The district court reversed the bankruptcy court, concluding that the bankruptcy
9 code, specifically 11 U.S.C. § 106(a), provided the bankruptcy court with
10 independent jurisdiction over PNA’s adversary action. *Id.* While the Ninth Circuit
11 rejected the district court’s conclusion that § 106(a) independently provided
12 jurisdiction to the bankruptcy court, the Ninth Circuit concluded that FIRREA did
13 not strip jurisdiction because FIRREA’s exhaustion requirement applied only to
14 creditors, not debtors. *Id.* at 1152. The Ninth Circuit added that holding otherwise
15 would undermine the bankruptcy system by preventing the bankruptcy court from
16 allowing claims filed by the RTC. *Id.*

17 In *Sharpe v. FDIC*, 126 F.3d 1147 (9th Cir. 1997), the Ninth Circuit again
18 had occasion to interpret § 1821(d)(13)(D). *Sharpe* involved a real estate
19 foreclosure action. 126 F.3d at 1150. The parties to the action entered into a
20 settlement agreement in which Pioneer Bank was to pay Whitney and Mona

1 Sharpe \$510,000 by wire transfer. *Id.* The Sharpes were required to
2 simultaneously deliver a promissory note they had executed with a third party,
3 deliver the deed of trust to the real property at issue, and execute a request for
4 reconveyance of the deed of trust. *Id.* The Sharpes delivered and executed the
5 necessary documents. *Id.* However, instead of paying the Sharpes by wire
6 transfer, Pioneer Bank provided the Sharpes with two cashier's checks totaling
7 \$510,000. *Id.* at 1150-51. After the documents and cashier's checks were
8 exchanged, but before the Sharpes had deposited the cashier's checks, Pioneer
9 Bank was seized by state regulators and the FDIC was appointed receiver of the
10 bank. *Id.* at 1151. The FDIC informed the Sharpes that it would not honor the
11 cashier's checks. *Id.*

12 The Sharpes filed suit against the FDIC in federal district court seeking
13 enforcement or rescission of the settlement agreement. *Id.* The parties, by joint
14 stipulation, stayed the action pending resolution of the Sharpes' administrative
15 claim before the FDIC. *Id.* The FDIC "“allowed”" the Sharpes' claim and
16 provided the Sharpes with \$100,000 in cash and a \$380,000 receiver's certificate.
17 *Id.* The stay of the district court action was lifted, and the district court granted the
18 FDIC's motion to dismiss for lack of jurisdiction based on its conclusion that
19 "“allowed” claims were not reviewable pursuant to § 1821(d)(13)(D). *Id.* The
20 Sharpes appealed.

1 The Ninth Circuit, instead of determining whether allowance of a claim in
2 FIRREA's administrative process precluded review in the district court, concluded
3 that the Sharpes' claim fell outside of the scope of § 1821(d)(13)(D) and did not
4 require exhaustion. *Id.* at 1156. The panel held that the exhaustion requirement of
5 § 1821(d)(13)(D) applied to creditors of the FDIC and that the Sharpes were not
6 creditors of the FDIC. *Id.* The court rejected the FDIC's argument that the
7 Sharpes' acceptance of the cashier's checks rendered them creditors for the
8 purposes of FIRREA. *Id.* The court concluded that but for the FDIC's breach of
9 the settlement agreement, the whole \$510,000 would have been wire transferred to
10 the Sharpes concurrently with the Sharpes' performance under the settlement
11 agreement. *Id.* Accordingly, but for the FDIC's breach, the Sharpes would not be
12 owed money by the bank, and could not be construed as creditors. *Id.* To allow
13 the FDIC to rely on the exhaustion requirement of FIRREA would not only result
14 in the FDIC being "free to breach any pre-receivership contract, keep the benefit of
15 the bargain, and then escape the consequences by hiding behind the FIRREA
16 claims process," but would also "effectively preempt state contract law." *Id.* In
17 short, the court held that the Sharpes were not creditors of the FDIC because "[t]he
18 Sharpes [were] a party to a pre-receivership contract breached by the FDIC, and
19 they retain the rights accompanying that contract notwithstanding the appointment
20 of the FDIC as receiver." *Id.*

1 More recently in *McCarthy v. FDIC*, 348 F.3d 1075 (2003), the Ninth
2 Circuit had an occasion to revisit the holdings in *Parker* and *Sharpe*. Ralph
3 McCarthy was negotiating a loan with Superior Bank, F.S.B. (“Superior”) when
4 the bank failed and the FDIC was appointed as receiver. *McCarthy*, 348 F.3d at
5 1076. Despite being in receivership, a division of Superior continued with the loan
6 process to Mr. McCarthy. *Id.* at 1077. Initially, Superior approved a \$117,400
7 loan for Mr. McCarthy secured by ten acres of Mr. McCarthy’s property. *Id.*
8 Ultimately, however, Mr. McCarthy entered into a loan agreement for \$138,000
9 secured by thirty five acres of land at a higher interest rate. *Id.* Mr. McCarthy
10 eventually brought suit in federal court alleging that he was coerced into entering
11 the second loan, and that he would not have entered the loan agreement had he
12 known Superior was in receivership. *Id.* Mr. McCarthy sought an offset of
13 \$50,400 against the amount owed on the loan and a reduction in his interest rate.
14 *Id.* The district court dismissed Mr. McCarthy’s claim for lack of jurisdiction.

15 On appeal, Mr. McCarthy argued that the exhaustion requirement did not
16 apply to him because, under *Sharpe* and *Parker*, he was a debtor and not a creditor.
17 *Id.* The Ninth Circuit noted that “*Sharpe* was an unusual case.” *Id.* at 1078.
18 While recognizing that the *Sharpe* court had concluded that the Sharpes were not
19 creditors as part of its holding that FIRREA’s exhaustion requirement did not
20 apply, the *McCarthy* court observed that the Sharpes also were not debtors. *Id.*

1 Accordingly, the *Sharpe* decision did not address whether exhaustion was required
2 of debtors. *Id.* While *Parker* did address debtors, the *McCarthy* court limited
3 *Parker*'s holding to the bankruptcy context. *Id.* The *McCarthy* court concluded
4 that "[a]part from claims made in the context of a bankruptcy proceeding or arising
5 out of a breach of contract in the circumstances present in *Sharpe*, . . . a claimant
6 must complete the claims process before seeking judicial review." *Id.* (citing
7 *Henderson v. Bank of New Eng.*, 986 F.2d 319, 321 (9th Cir. 1993)).

8 Plaintiffs in this case recognize that, after *McCarthy*, whether they are
9 labeled creditors or debtors is not dispositive. Plaintiffs argue, however, that
10 *McCarthy* stands for the proposition that only claims seeking money from the bank
11 in receivership require exhaustion. However, *McCarthy* gave effect to the full
12 language of § 1821(d)(13)(D) which requires exhaustion for "any claim or action
13 for payment" and also for "any action seeking a determination of rights with
14 respect to, the assets of any depository institution for which the Corporation has
15 been appointed receiver." § 1821(d)(13)(D)(i). While Mr. McCarthy sought
16 \$50,400 as part of his claim, he also sought a reduction in his interest rate.
17 *McCarthy*, 348 F.3d at 1077. The *McCarthy* court concluded that claims to
18 "lower[] the interest rate and restrict[] remedial options that are available to the
19 receiver" are subject to FIRREA's exhaustion requirement. *Id.* at 1079.
20 Accordingly, the exhaustion requirement "applies . . . to debtors with claims such

1 as McCarthy's that affect the assets of a failed institution." *Id.* at 1080. In short,
2 *McCarthy* stands for the proposition that both monetary and nonmonetary claims
3 require exhaustion. *Id.* at 1079 (citing *Henderson*, 986 F.2d at 321).

4 The Henrys' claims seek either to rescind Mr. Henry's personal guaranty on
5 the Bank of Whitman note or to give effect to the MOU and reduce Mr. Henry's
6 personal liability. A declaration to either effect would "affect the assets of" the
7 Bank of Whitman and would "restrict[] remedial options that are available to the
8 receiver." *Id.* at 1079-80. Accordingly, the Plaintiffs' claims against the FDIC are
9 within the scope of § 1821(d)(13)(D) as interpreted in *McCarthy*.

10 *McCarthy* did not foreclose all relief available under the logic of *Sharpe*, and
11 claims "arising out of a breach of contract in the circumstances present in *Sharpe*"
12 remain free of the exhaustion requirement. *Id.* at 1079. Plaintiffs repeatedly
13 analogize the facts alleged in their complaint to the facts in *Sharpe*; however,
14 *Sharpe* is distinguishable.

15 The *Sharpe* court relied on the fact that in breaching the contract with the
16 Sharpes the FDIC relied on no specific statutory authority. *See Sharpe*, 126 F.3d at
17 1157 ("Had the FDIC followed the §1821(e) procedure in disaffirming the
18 settlement agreement with the Sharpes, this would have been a very different
19 case."). In the present case, the FDIC's refusal to give effect to the MOU is based
20 on a specific statute that invalidates any agreement "which tend[s] to diminish or

1 defeat the interest of the [FDIC] in any asset acquired by it” where the agreement
2 is, among other things, not approved by the board of directors of the depository
3 institution nor maintained continuously in the official records of the depository
4 institution. 12 U.S.C. § 1823(e)(1)(C)-(D). As the FDIC is working pursuant to a
5 specific statutory section, the dangers identified in *Sharpe* are not present.

6 Plaintiff’s argument, in effect, asks the Court to conclude that the exhaustion
7 requirement does not apply whenever the FDIC invalidates an agreement under
8 § 1823(e). The plain language of § 1821(d)(13)(D) and § 1823(e)(1) belies such a
9 conclusion because § 1823 invalidates only those agreements “which tend[] to
10 diminish or defeat the interest of the [FDIC] in any asset acquired by it under”
11 FIRREA, § 1823(e)(1), and exhaustion applies to “any action seeking a
12 determination of rights with respect to, the assets of any depository institution for
13 which the Corporation has been appointed receiver, including assets which the
14 Corporation may acquire from itself as such receiver,” § 1821(d)(13)(D)(i).

15 The Court concludes that a determination that an agreement diminishes or
16 defeats the interest of the FDIC in an asset is necessarily a determination of rights
17 with respect to that asset. In light of the fact that the FDIC’s basis for not honoring
18 the MOU is § 1823(e), the *Sharpe* exception to the exhaustion requirement does
19 not apply.

1 Beyond the trio of *Sharpe*, *Parker*, and *McCarthy*, the Plaintiffs rely heavily
2 on the Ninth Circuit's decision in *Resolution Trust Corp. v. Midwest Fed. Sav.*
3 *Bank*, 36 F.3d 785 (9th Cir. 1993), for the prospect that the exhaustion requirement
4 does not apply to claims seeking equitable relief. However, *Resolution Trust's*
5 holding is not nearly so broad. *Resolution Trust* stands for the proposition that a
6 defendant to an action brought by a corporation acting as a receiver under FIRREA
7 is not barred from raising unexhausted affirmative defenses where the defendant
8 was not a creditor of the receiver and where the defendant "had no independent
9 basis for filing a claim against" the receiver. *Id.* at 793. In short, *Resolution Trust*
10 is about affirmative defenses, not equitable claims.

11 Finally, to the degree that the Plaintiffs make a more general argument that
12 they should not be subject to the exhaustion requirement because their claims are
13 simply not "'susceptible of resolution through the claims procedure,'" *Henderson*,
14 986 F.2d at 321 (quoting *Rosa v. Resolution Trust Corporation*, 938 F.2d 383, 391
15 (3d Cir. 1991)). However, the record contradicts that assertion because SMI
16 brought similar claims through the FDIC administrative process. ECF No. 32 at 7.
17 Nothing in the record or language of FIRREA suggests that the Henrys' claims
18 would not be amenable to resolution through the administrative process.

19 / / /

20 / / /

CONCLUSION

FIRREA deprives courts with jurisdiction over claims that could have been brought through FIRREA's administrative claims process but were not brought through that process. § 1821(d)(13)(D). Plaintiffs did not bring the claims alleged in the above-captioned complaint through FIRREA's administrative claim process. There is no basis in the record or the law for the Court to conclude that Plaintiffs' claims against the FDIC are not susceptible to resolution through FIRREA's claim procedures. Plaintiffs' claim for rescission and Plaintiffs' claim for enforcement of the MOU would affect the assets of the FDIC as receiver for Bank of Whitman. Accordingly, such claims are within the scope of § 1821(d)(13)(D)'s exhaustion requirement. *McCarthy*, 348 F.3d at 1080. Therefore, this Court lacks jurisdiction to hear Plaintiffs' claims against the FDIC.

The Plaintiffs' claims against the Conklin and Tribbett Defendants arise under state law. The Plaintiffs' complaint alleges that this Court may exercise supplemental jurisdiction over those state-law claims in light of the Plaintiffs' declaratory judgment action against the FDIC. As this Court has concluded it lacks jurisdiction over Plaintiffs' claims against the FDIC, the Court has no basis to assert original jurisdiction in this action and, consequently, no basis to extend

1 supplemental jurisdiction over the state-claims.¹ *See Brady v. Brown*, 51 F.3d 810,
2 816 (9th Cir. 1995). Accordingly, the Plaintiffs' state-law claims will be
3 dismissed.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. The FDIC's motion to dismiss, **ECF No. 14**, is **GRANTED**.

6 2. The Plaintiffs' complaint is hereby **DISMISSED WITHOUT**
7 **PREJUDICE** for lack of subject matter jurisdiction.

8 3. No costs or fees will be taxed to any party.

9 4. Judgment shall be entered.

10 **IT IS SO ORDERED.**

11 The District Court Executive is hereby directed to enter this Order, to
12 provide copies to counsel, and to **CLOSE** this file.

13 **DATED** this 4th day of December 2012.

14
15 *s/ Rosanna Malouf Peterson*
16 ROSANNA MALOUF PETERSON
Chief United States District Court Judge

17 ¹Even if the Court had discretion to exercise supplemental jurisdiction in this
18 case, the Court would decline such an exercise where no federal question remains.
19 This case has not yet proceeded to discovery; as a result, the Court's interest in
20 judicial economy does not strongly favor retention. Similarly, nothing in the
record suggests that this federal forum would provide a more convenient or fair
forum for determination of the Plaintiffs' state-law issues. Therefore, the interest
of comity controls and directs this Court to dismiss this case for want of subject
matter jurisdiction.